No. A21A0043

In the
COURT OF APPEALS FOR THE STATE OF GEORGIA

GENERAL MOTORS LLC,
Appellant/Defendant,

v.

ROBERT RANDALL BUCHANAN,
individually and as Administrator of the
ESTATE of GLENDA MARIE BUCHANAN
Appellee/Plaintiff.

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AND NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF APPELLANT/DEFENDANT

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STATEMENT OF INTEREST

This case is of importance to *amici* and their members because it raises the core issue of whether Georgia courts can be relied upon to fairly administer discovery in cases involving product manufacturers and other companies located both inside and outside of Georgia. Discovery has long been a vital tool for American litigation, but *amici* are concerned that allowing the deposition of a CEO or other high-ranking corporate executive in a regular products liability case when, as here, the executive does not have direct knowledge of the facts at issue, could be improperly manipulated to undermine the pursuit of justice. Such subpoenas are unduly burdensome for manufacturers and other companies because, if allowed, they would become part of the standard discovery arsenal in a wide array of cases.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community

and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.[1]

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues, including attempts as here to create unprincipled industry-wide liability through misusing state and federal laws never intended for those purposes.

National Electrical Manufacturers Association ("NEMA") is the association of electrical equipment manufacturers, founded in 1926. NEMA sponsors the development of and publishes over 500 standards relating to electrical products and their use. NEMA's member companies manufacture a diverse set of products including power transmission and distribution equipment, lighting systems, factory automation and control systems, building controls and electrical systems components, and medical diagnostic imaging systems.

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[1] *Amici* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF FACTS

Amici adopts Applicant's Statement of Facts and Procedural History to the extent necessary for the arguments stated herein.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This appeal goes to the heart of the integrity of discovery in Georgia's civil justice system. The goal of discovery, as the Court has recognized, is to facilitate "the fair resolution of legal disputes." *Int'l Harvester Co. v. Cunningham*, 245 Ga. App. 736, 738 (2000). However, there are times, as here, when discovery can be improperly leveraged to *distort*, not *advance* justice. Subpoenaing a corporate executive with no unique knowledge of a matter, as Plaintiff's counsel has done here, is often used to generate an unwarranted litigation advantage unconnected to the substantive merits of the case. Reversing the trial court's order denying Defendant's protective order from such a discovery tactic, therefore, is critical for promoting responsible discovery and limiting the potential for discovery abuse.

Manufacturers and other companies must be able to rely on Georgia courts to follow sound precedent and produce just outcomes, even in difficult situations. Here, a fair application of Georgia's rules of civil procedure requires quashing this deposition demand. Although discovery rules are intentionally broad to facilitate the search for truth, they also have limits: litigants must be protected "from

annoyance, embarrassment, oppression, or under burden of expense." O.C.G.A. § 9-11-26(c). As courts in Georgia and other states have found, seeking to depose a high-level executive during discovery "creates a tremendous potential for abuse or harassment." *Apple Inc. v. Samsung Elecs. Co.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012); *Tankersley v. Security Nat'l Corp.*, 122 Ga. App. 129 (1970) (striking such a demand). They should be allowed sparingly. Here, Plaintiff has made no showing that the deposition of the executive in question is needed for the case to be properly heard. To the contrary, the corporate executive at issue has attested that she has no unique, specialized or superior knowledge of any of the issues in this case.

The importance of this issue is underscored by the decades-long concern that courts in Georgia and around the country have had over the ability of the parties to abuse discovery rules. The fair and efficient functioning of the civil justice system is a critical element of American global competitiveness. Too often, the high costs and imperfections of discovery interfere with that competitiveness by undermining the ability of the courts to reliably achieve justice. In some lawsuits, discovery has become "the main event—the end game—in pretrial litigation proceedings," as litigants use discovery requests like the one here to pressure a party to settle, rather than litigate the merits of a case. Hon. Patrick Higginbotham, *The Disappearing Trial and Why We Should Care*, RAND REVIEW (Summer 2004).

Finding the right balance over discovery requests has proven to be an ongoing battle, both in Georgia and at the federal level. The Federal Rules Advisory Committee has long observed that the spirit of discovery "is violated when advocates attempt to use discovery tools as tactical weapons rather than expose the facts and illuminate the issues." Fed. R. Civ. P. 26 Advisory Committee Notes (1983). The Federal Rules have been amended numerous times to curb the potential that discovery will distort litigation outcomes. Recently, Rule 26 was amended to direct courts to be "more aggressive in identifying and discouraging discovery overuse." Fed. R. Civ. P. 26 Advisory Committee Notes (2015).

The Court should reverse the trial court's order to ensure that the deposition of a high-level executive is reserved for only when it is truly needed for the pursuit of justice, rather than an unjust attempt to gain an unwarranted litigation advantage irrespective of the facts. If the trial court's approval of this discovery demand is upheld, it will incentivize abusive discovery, erode confidence in judicial discovery process, and undermine fundamental fairness and justice for manufacturers and other corporate litigants.

ARGUMENT

The trial court allowed Plaintiff's demand to depose Ms. Barra, the CEO of Defendant New GM, in this personal injury case based on general statements Ms.

Barra made, publicly and in congressional testimony, and changes she directed be put in place in her effort to advance her company's culture of safety. As the trial court noted, Ms. Barra, who became CEO in January 2014, implemented several such *general* initiatives, including efforts to investigate and eliminate safety issues and the "Speak Up for Safety" program to emphasize safety reporting.

Her leadership on these important institutional changes has *no* direct connection with the incident giving rise to this case. Here, Plaintiff alleges his wife was involved in an accident while driving a 2007 Chevrolet Trailblazer. He alleges the Electronic Stability Control System and a component steering wheel angle sensor were defective and failed to prevent the accident. In 2018, as part of New GM's Speak Up for Safety program, the company investigated these systems in the 2007 Trailblazer and other models. Accordingly, it provided Plaintiff with information, materials and depositions of technical witnesses regarding this investigation as part of traditional discovery. As New GM has stated, Ms. Barra was not involved in the design or investigation of these systems, and she does not have any unique, specialized or superior knowledge of issues related to this case.

Yet, the trial court would allow this deposition to proceed, asserting "there is no express or implied law in Georgia for the 'apex doctrine' or other framework" that would protect against deposition demands of high-level executives. Rather, the

trial court claims it cannot limit such discovery without a showing of "*substantial evidence* that *bad faith or harassment motivates the* discoveror's *action*." (italics in original, underline added). Georgia's discovery rule and relevant case law, however, requires no such showing of intent. It states that a protective order should be given whenever "justice requires" that a person be protected "from annoyance, embarrassment, oppression, or undue burden or expense." O.C.G.A. § 9-11-26(c). Georgia's rule, therefore, looks at the *effect*, not the *motivation*, of a discovery demand. This Court should reverse the trial court's ruling to make sure Georgia courts properly apply Rule 26(c) and protect parties from discovery abuse.

I. GEORGIA LAW PROVIDES COURTS WITH THE ABILITY AND MANDATE TO PROTECT AGAINST THIS TYPE OF DISCOVERY DEMAND

This Court should make it clear that, under existing Georgia law, the trial court should issue the protective order sought here. Courts in this state have long embraced the importance of preventing depositions that are "oppressive, unreasonable, unduly burdensome or expensive, harassing, harsh, insulting, annoying, embarrassing, incriminating or directed to wholly irrelevant and immaterial or privileged matters, or as to matter concerning which full information is already at hand." *Hampton Island Founders v. Liberty Capital*, 283 Ga. 289, 296

(2008) (quoting *Young v. Jones*, 149 Ga. App. 819, 824-825 (1979)); *Sechler Family P'ship v. Prime Grp., Inc.*, 255 Ga. App. 854, 857 (2002).

Decades ago, this Court ruled in *Tankersley* that it is appropriate under Georgia law to quash deposition notices improperly directed to high-level executives of a company. *See* 122 Ga. App. at 129. The Court explained that the deposition demand should be quashed because the information "sought was already admitted or had already been secured by the use of interrogatories, and if any further information was needed it could be secured by further interrogatories." *Id*. at 130. More recently, this Court in *Wheeling-Culligan v. Allen*, upheld the quashing of a former Delta Airlines CEO deposition subpoena, as the trial court determined the CEO had "adequately responded to the interrogatories and that Wheeling-Culligan had alternate sources with more direct, specific or unique knowledge of the matters of which she sought to depose [CEO]." 243 Ga. App. 776, 776-777 (2000).

These rulings are consistent with how federal courts have applied comparable provisions in the Federal Rules of Civil Procedure, which the Court has instructed should be given "consideration and great weight" when trial courts apply the state's procedural rules. *Bicknell v. CBT Factors Corp.*, 171 Ga. App. 897, 899 (1984). As in Georgia, federal courts have also looked to whether the

deposition would be oppressive, inconvenient, harassing, or burdensome given the information available from other sources. Using the reasoning *amici* urge the Court to adopt here, federal courts routinely decline to permit depositions of high-ranking corporate executives when they lack personal or specialized knowledge about the facts at issue in the pending litigation. *See, e.g., Jiminez-Carillo v. Autopart Int'l, Inc.*, 285 F.R.D. 668, 670 (S.D. Fla. 2012) (explaining depositions of corporate executives "who lack personal knowledge of the particular facts" are unwarranted).

As these courts have explained, the actions of high-level executives in setting corporate policy, speaking for the company on important safety issues, and advancing corporate culture are not sufficient bases for permitting these depositions. *See, e.g., Guest v. Carnival Corp.*, 917 F. Supp. 2d 1242, 1243 (S.D. Fla. 2012) (quashing a subpoena for these reasons); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. 11-CV-01528-REB-KLM, 2011 WL 2535067 at *3 (D. Colo. June 27, 2011) (holding the involvement of an executive in a PowerPoint presentation was insufficient to permit the deposition of the executive).

These activities—typical for many high-level corporate executives—do not give these individuals the necessary personal involvement or knowledge to be truly useful in the lawsuit. *See Simon v. Pronational Ins. Co.*, No. 07-60757-CIV, 2007 WL 4893478 at *1 (S.D. Fla. Dec. 13, 2007); *accord Carnival Corp. v. Rolls-*

Royce, PLC, No. 08-23318-CIV, 2010 WL 1644959, at *3 (S.D. Fla. Apr. 22, 2010) (precluding deposition because executive's "knowledge regarding the underlying facts . . . are at best speculative"); *Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C 05-4374MMC (JL), 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007) ("[Where] a high-level decision maker 'removed from the daily subjects of the litigation' has no unique personal knowledge of the facts at issue, a deposition of the official is improper."). Thus, broadly permitting executive depositions does nothing more than "create a tool for harassment." *Treppel v. Biovail Corp.*, No. 03 Civ. 3002 PKL JCF, 2006 WL 468314, at *1 (S.D.N.Y. Feb. 28, 2006).

Amici do not intend to suggest that under no circumstances may a high-level executive be deposed. Such a deposition may be appropriate and necessary to the pursuit of justice when a person, in fact, has direct, unique personal knowledge not obtainable elsewhere. *See, e.g., Bose Corp. v. Able Planet, Inc.*, 11-CV-01435-MSK-MJW, 2012 WL 5354795 (D. Colo. Oct. 30, 2012) (granting motion to compel deposition because the deponent had "unique personal knowledge related to his work"); *In re Google Litig.*, No. C 08-03172 RMW PSG, 2011 WL 4985279 (N.D. Cal. Oct. 19, 2011) (permitting deposition of CEO who had unique knowledge of facts that could not be secured by less obtrusive means); *Minter v. Wells Fargo Bank, NA*, 258 F.R.D. 118, 127 (D. Md. 2009) (permitting deposition

of CEO where there was direct evidence the witness possessed unique knowledge regarding the subject matter of the lawsuit).

Plaintiff has not demonstrated that any such valid circumstance exists for Ms. Barra's deposition here. This Court should reverse the trial court's ruling to reinforce that Georgia courts must protect against this type of discovery abuse.

II. GEORGIA DISCOVERY PRACTICES SHOULD REMAIN WITHIN MAINSTREAM AMERICAN JURISPRUDENCE

Courts in other jurisdictions with criteria similar to Georgia's standard for protective orders have likewise precluded depositions of high-ranking corporate executives when those persons lack unique or specialized knowledge. These jurisdictions include those that have not adopted the "apex doctrine," as well as those which have. Formal recognition of the "apex doctrine" is not needed for Georgia courts to properly protect executives from these abusive litigation demands. The "apex doctrine" nomenclature is an enunciation of existing principles identifying under which circumstances executives can be deposed.

For example, the Missouri Supreme Court declined to adopt the apex doctrine *per se*, but nonetheless granted a motion for a protective order of a high-level executive. *See State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 609 (Mo. 2002). The court explained that, in determining whether to allow "top-level employee depositions, the court should consider: whether other methods of

discovery have been pursued; the proponent's need for discovery by top-level deposition; and the burden, expense, annoyance, and oppression to the organization and the proposed deponent." *Id.* at 607. The Oklahoma Supreme Court has also declined to adopt the "apex doctrine," but has applied the same standard. *See Crest Infiniti II, LP v. Swinton*, 174 P.3d 966, 1004-1005 (Okla. 2007) (allowing for a protective order when an executive deposition "would inflict annoyance, harassment, embarrassment, oppression or undue delay, burden or expense" or where another corporate official can "provide the information sought").

Georgia Attorney General Chris Carr, along with other state attorneys general, have similarly observed that "[e]ven states that have not adopted [the apex doctrine] have recognized the importance of limiting the ability of litigants to force high-ranking officials to sit for depositions." Amici Curiae Brief of 15 State Attorneys General, *U.S. Dep't of Commerce v. U.S. Dist. Court for the Southern Dist. of New York*, Case No. 18-557 (U.S. Dec. 21, 2018), at 33 (joined by Georgia Attorney General Carr).[2] "[F]ailing to require litigants to exhaust other means of

[2] *See also Cheney v. U.S. Dist. Court*, 542 U.S. 367, 386 (2004) (stating depositions of high-ranking state officials can "disrupt the functioning of the Executive Branch"); *Lederman v. N.Y. City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) ("If courts did not limit these depositions, such officials would spend an inordinate amount of time tending to pending litigation.") (internal quotation omitted).

obtaining relevant information will only increase the risk of high-level officials facing harassing depositions." *Id*. at 4. Carr and the other attorneys general were concerned that similar tactics could be used against state officials.

This Court may nonetheless find rulings adopting the "apex doctrine" useful in setting forth the factors lower courts should consider when a party seeks to depose a high-ranking executive. *See Netscout Sys., Inc. v. Gartner, Inc.*, 63 Conn. L. Rptr. 2, 2016 WL 5339454, at *6 (Conn. Super. Ct. Aug. 22, 2016) (setting forth what constitutes "good cause . . . to justify a protective order precluding a CEO's deposition"); *Bradshaw v. Maiden*, No. 14-CVS-14445, 2017 WL 1238823, at *4 (N.C. Super. Ct. Mecklenburg Co. Bus. Ct. Mar. 31, 2017) (same).

In Texas, the state Supreme Court requires a showing that the executive has some "unique or superior *personal* knowledge of discoverable information." *See Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) (emphasis added). As courts there have held, actions more closely connected to the incident giving rise to litigation than those alleged by Plaintiff here—namely, briefing the media and families about an accident, mobilizing an investigation to learn the cause of the accident, and sending personal letters to affected passengers—did not constitute sufficient personal involvement to warrant a

deposition. *See In re Continental Airlines*, 305 S.W.3d 849, 853-858 (Tex. Ct. App. 2010).

The Court of Appeals of Michigan issued a similar ruling in *Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490 (Mich. Ct. App. 2010), a case which, like the one at bar, involved a motor vehicle products liability lawsuit. There, the plaintiff sought to take the deposition of the automaker's Chairman, CEO and COO. The plaintiffs argued the COO made public statements regarding safety and testified before Congress regarding vehicle recalls; the CEO had testified before Congress that he would be involved in the quality-control review. *See id*. at 491-92. Yet, the court found the trial court erred in not denying the protective orders given, in part, the lack of any personal knowledge of the witnesses. *See id*. at 497. "[A]s will presumably often be the case in the instance of a large national or international corporation, the trial court should issue the protective order and first require the plaintiff to obtain the necessary discovery through less intrusive methods." *Liberty Mut. Ins. Co. v. Sup. Ct.*, 10 Cal.App.4th 1282, 1289 (1992).

Speaking in public on broad issues of safety, testifying in Congress, and setting in motion important safety programs and cultural changes are critical to a company's success. They are not, however, sufficient personal involvement to warrant a deposition in a products liability case—in Georgia, in other states, or

under the Federal Rules of Civil Procedure. This Court should explicitly hold the discovery request here is improper and provide this guidance to the lower courts.

III. DISCOVERY TACTICS SHOULD NOT INTERFERE WITH THE VITAL ROLE OF COMPANY LEADERSHIP IN IMPROVING CORPORATE CULTURE, PARTICULARLY ON SAFETY ISSUES

It is critically important that executives are free to advance a beneficial corporate culture without fear of being subjected to deposition simply because of their job title when they have no direct involvement in or superior knowledge of a given lawsuit. "The job of the president of the company is to manage the company, not to fly around the United States participating in depositions." *General Star Indem. Co. v. Atlantic Hospitality of Florida, LLC*, 57 So. 3d 238, 240 (Fla. Ct. App. 2011). These leaders should not be subject to depositions based on the types of beneficial statements about safety, the implementation of safety programs, or the advancement of corporate safety cultures that are at issue here. Consumers, employees and other members of the public benefit significantly when leaders, like Ms. Barra, take a personal stake in advancing a better corporate culture.

Based on *amici's* experience, developing a strong safety culture demands that high-level executives publicly and repetitively articulate the cultural attributes they want to see in their organizations, much like Ms. Barra has done. Others in the organization are then relied upon to implement that vision. This needed visibility

on driving cultural changes, though, cannot occur if senior executives must worry about being hauled into court and taken away from running their businesses, solely for publicly discussing these important safety issues. The Court should reverse the trial court's ruling to allow and incentivize senior corporate leadership to engage and energize their organizations and the public on important safety matters without fear of opening themselves and their companies to vexatious litigation tactics.

In today's litigious society, large product manufacturers can have hundreds, if not thousands, of pending cases at any moment in time. Litigation financing, the explosion of lawsuit advertising, and the cultivating of mass torts has led to a significant increase in product-based lawsuits, irrespective of the merits of a specific case. These "[v]ast numbers of personal injury claims could result in the deposition of the president of a national or international company whose product was somehow involved." *Liberty Mut. Ins. Co.*, at 1287. The same is true for financial institutions, insurance companies and other large corporations. *See id.* ("Surely an insurance company's chief executive will seldom, if at all, be involved in the day-to-day processing of claims."). There are many areas, including workplace safety, where leadership from the corporate executives can be integral to achieving vital corporate cultural advances. Many people benefit when executives personally invest in positive cultural change.

Subjecting executives to frivolous depositions in every type of case in every jurisdiction inures only to the benefit of litigants engaged in discovery abuse. At this point, "[v]irtually every court that has address this subject has noted that deposing officials at the highest level of corporate management creates a tremendous potential for abuse and harassment." S. Mager, *Curtailing Deposition Abuses of Senior Corporate Executives*, 45 Judges J. 30, 33 (2006); *see also Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 365 (D.R.I. 1985) ("Unfortunately, discovery has become an abusive tool in the hands of certain attorneys.")

Ensuring the integrity of the civil justice system is critical; each case, including the one at bar, deserves to be decided on its merits. Accordingly, discovery should be targeted and tailored to allow both plaintiffs and defendants to access justice. Executives tasked with running a company should have to sit for depositions only when they have direct involvement and superior knowledge of the issues in the litigation. Otherwise, as Defendant has done here, litigants should be directed to the individuals, other than the executive, who actually have personal knowledge about the issues relevant to the case. Seeking to depose an executive is a pressure tactic that, when misused, is corrosive to the goals of civil justice.

CONCLUSION

For these reasons, this Court should reverse the trial court's discovery order denying New GM's motion for a protective order from this discovery request.

Respectfully submitted,

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RULE 24 CERTIFICATION

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

I certify that on the 17th day of November 2020, I caused to be served the foregoing *AMICI CURIAE* BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AND NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF APPLICANT in a first-class postage-prepaid envelope addressed to the following:

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